> *There is no mention of Asahi in plaintiffs' opposition papers*, however plaintiffs did assert that defendants engaged in additional conduct with the forum State of New Jersey beyond placing the product into the stream of commerce. Plaintiffs' Brief at 9-16. In addition, at oral argument, plaintiffs maintained that defendants all engaged in additional conduct with the forum State of New Jersey such that personal jurisdiction over them is proper . . . .; *Because plaintiffs have argued that additional conduct in the forum State was present, this Court will analyze the instant case under Justice O'Connor's approach.*

Pet. App. 28a (emphasis added).

Finally, although the New Jersey Court never had to reach the issue of whether exercising jurisdiction over the defendants was reasonable, the court still applied the reasonableness factors in *Asahi Metal* to the facts of this case. The New Jersey Court made clear that its finding a lack of personal jurisdiction would not change under a different view of stream of commerce because asserting jurisdiction would be unreasonable. In footnote 10 the court emphasized:

> Because this Court has found that defendants did not purposefully direct their actions to . . . New Jersey . . . there is no need for the Court to address whether exercising personal jurisdiction over defendants would offend traditional notions of fair play and substantial justice. However, the Court notes that each defendant is a foreign corporation with their

> *principal places of business, as well as their* employees and documents, in Austria, the Bahamas, and Canada. 'The unique burdens placed up an [sic] one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.' *Asahi*, 480 U.S. at 114. In addition, this Court has serious doubts as to any burden on plaintiffs to litigate this case outside of the forum State of New Jersey because on December 30, 2002, plaintiffs filed a lawsuit against these parties seeking the same relief in the Southern District of Florida. Therefore, *even under Justice Brennan's and Justice Steven's analysis from Asahi, this Court still does not have personal jurisdiction over defendants.*

Pet. App. 38a - 39a (emphasis added).

On May 5, 2003, rather than appealing the New Jersey District Court's April 24, 2003 substantive order dismissing the Complaint for lack of personal jurisdiction to the Third Circuit Court of Appeals, Petitioners instead chose to submit to the New Jersey District a motion requesting modification of the April 24, 2003 order to transfer the case to Florida. Specifically, Petitioners requested the court transfer the action to the Southern District of Florida pursuant to 28 U.S.C. § 1404(a), 28 U.S.C. § 1406(a) and/or 28 U.S.C. § 1631. Resp. App. 6a.

In their memorandum of law supporting their motion for relief from the New Jersey Court's April 24, 2003 dismissal order Petitioners requested the case be transferred to avoid their being prevented from invoking the jurisdiction of the Florida District Court by the statute of limitations.

Resp. App. 5a - 6a. It bears mentioning that nowhere in their motion or supporting memorandum of law did Petitioners ever raise any objection to or otherwise contest the New Jersey District Court's substantive finding that it lacked personal jurisdiction over Respondent. To the contrary, Petitioners stated:

> This motion is filed *solely* as a matter of prudence to forestall the possibility of a claim by the defendants in an identical action filed in Florida that the complaint is barred by the statute of limitations in Florida. The modest relief the plaintiffs seek in this motion *does not change the substance of the Court's ruling that personal jurisdiction over the defendants is not proper in New Jersey . . . [t]his relief, if granted, preserves the essence of the Court's ruling on lack of jurisdiction in New Jersey.*
>
> Resp. App. 5a - 6a (emphasis added).

On May 22, 2003, the New Jersey District Court entered an order modifying its April 24, 2003 order of dismissal by transferring the complaint to the District Court for the Southern District of Florida. Pet. App. 18a - 19a. After the transfer on August 18, 2003, the Southern District of Florida consolidated the newly transferred New Jersey action with the "saving action." In Florida, all defendants again filed motions to dismiss for lack of personal jurisdiction. On March 22, 2004, the Florida District Court granted all defendants' motions and dismissed the case with prejudice.

Petitioners then filed their appeal to the Eleventh Circuit Court of Appeals. There Petitioners sought review of both the New Jersey Court's April 24, 2003 order dismissing the Complaint and the May 22, 2003 order of modification and transfer to the Florida court. Petitioners also sought

review of the Southern District of Florida's order dismissing the Complaint with prejudice for lack of personal jurisdiction. After Respondent filed a motion for partial dismissal of the portion of the appeal seeking review of the orders entered by the New Jersey District Court, the Eleventh Circuit dismissed this portion of the appeal on the grounds it lacked appellate jurisdiction over the orders entered by a district court located in another regional circuit. Pet. App. 15a - 16a. As to Petitioners' appeal of the Florida District Court's dismissal for lack of personal jurisdiction, the Eleventh Circuit, reviewing the dismissal order *de novo* and affirming, found a lack of general personal jurisdiction over all defendants in Florida. In its decision dated April 22, 2005, the Eleventh Circuit focused on the attenuated nature of the contacts that Respondent had with Florida:

> No exercise of jurisdiction, be it general or specific, may offend 'traditional notions of fair play and substantial justice.' *International Shoe Co. v. Washington*, 66 S. Ct. 154, 158 (1945) . . . [e]ven if – as the [Florida] district court assumed without deciding – the Florida long-arm statute conferred (general) jurisdiction . . . the exercise of jurisdiction would offend traditional notions of fair play and substantial justice . . . [t]he only contact the subject engine had with Florida is that a Florida corporation received shipment of the engine in Florida for delivery to a Mississippi corporation who then delivered the engine to a New Jersey purchaser. The contact of these international Defendants with Florida in terms of *this engine* is even more removed.
>
> Pet. App. 8a.

As to Petitioners' attempt to seek review of the New Jersey District Court's April 24, 2003 order of dismissal, the Eleventh Circuit noted in its opinion that *"[i]nstead of appealing the [New Jersey Court's] dismissal order*, Plaintiffs moved to reopen the New Jersey action and to have the action transferred to the Southern District of Florida." Pet. App. 4a (emphasis added). Thus, the Eleventh Circuit expressly recognized Petitioners could have directly appealed the New Jersey Court's order of dismissal to the Third Circuit, but chose not to and instead asked that the case be transferred.

REASONS FOR DENYING THE WRIT

The Petition for Certiorari should be denied because it satisfies none of the criteria for certiorari review in this Court. Rather than present genuinely certiorari worthy questions, the Petition is a poorly disguised attempt to have this Court overturn the underlying decisions of the New Jersey District Court and the Eleventh Circuit Court of Appeals dismissing Petitioners' Complaints for lack of personal jurisdiction. Petitioners initially chose to file suit in New Jersey's District Court. When that court dismissed their Complaint for lack of personal jurisdiction, Petitioners, as the Eleventh Circuit noted, could have appealed that court's dismissal order to the Third Circuit Court of Appeals. However, they simply chose not to, instead preferring to request that the case be transferred. Standing alone, the New Jersey District's dismissal order was immediately appealable because: 1) it dismissed the Complaint against all defendants, leaving no issues for the New Jersey Court to decide, 2) it was not coupled with a transfer order, and 3) it specified that the case was "closed." Despite the fact that the order was immediately appealable, Petitioners chose to file a motion to modify the order and transfer the case to Florida.

These facts demonstrate the conflict amongst the circuits that Petitioners primarily urge warrants this Court's review is illusory. The cases Petitioners cite as being in conflict all involved pre-transfer interlocutory orders that were not immediately appealable in the transferor circuit. This case, however, does not present that question because the New Jersey Court's order of dismissal was immediately appealable. This Court cannot accept a case to review a question that the case, because of its facts, does not frame.

Additionally, in an attempt to find a jurisdictional hook to support this Court's review of the merits of the decisions below with which they are unhappy, Petitioners allege a conflict in the federal circuits regarding application of Justice O'Connor's stream of commerce view in *Asahi Metal*. However, because both the New Jersey District and the Eleventh Circuit concluded that jurisdiction over this Austrian Respondent would be unreasonable, even if it had minimum contacts with the forum state, resolution of the so-called conflict would not make a difference in this case. If the Court is inclined to address the divergent stream of commerce theories set forth in *Asahi Metal*, it ought to do so in a case in which such effort would actually affect the result.

Petitioners also allege a circuit split as to whether *Asahi Metal*'s application of the Due Process reasonableness factors can be applied to general personal jurisdiction cases. But, in concluding jurisdiction over Respondent in Florida would be unreasonable, the Eleventh Circuit considered factors this Court approved more than thirty years ago. Accordingly, in the absence of any circuit split on the issue, and in light of this Court's settled precedent, there is nothing compelling about this case that warrants the attention of the Court.

I. There Is No Conflict In The Circuits On The Question Presented By This Case: Whether A Circuit Court May Review An Immediately Appealable Pre-Transfer Order Of A Transferor District Court Located Outside The Circuit.

The circuit conflict Petitioners claim exists regarding appellate review of pre-transfer rulings of a transferor district court located outside the reviewing court's circuit is entirely illusory and thus insufficient to merit certiorari review. There is no circuit split on the specific legal question presented by this case, which arises from the Eleventh Circuit's refusal to review a pre-transfer, *immediately appealable* order of a district court outside the Eleventh Circuit. Even if this Court finds any disagreement among the federal courts regarding reviewability of pre-transfer *interlocutory* orders issued by out-of-circuit district courts, resolution of that conflict will not change the result in this case.

While Petitioners initially appealed both orders entered by the New Jersey Court to the Eleventh Circuit, the Petition alleges a circuit conflict exists only with regards to an out-of-circuit district court's "*pre-transfer*" rulings. By its very terms, the Petition limits the relevant inquiry in this case only to the New Jersey Court's April 24, 2003, pre-transfer dismissal order - which was immediately appealable - and excludes the subsequent and separate May 22, 2003 interlocutory order transferring the case to Florida.

In presenting the purported circuit split to the Court, Petitioners fail to distinguish between interlocutory and immediately appealable orders, and thus misstate the question this case actually presents. Such a distinction is essential however. Because the April 24, 2003 pre-transfer dismissal order was immediately appealable and not a transfer or interlocutory order, the only issue for the Court to decide is whether there is a conflict among the circuits as to

whether a circuit court may review a pre-transfer, *immediately appealable* order issued by an out-of-circuit transferor district court. The disagreement among the circuits cited in the cases relied on by Petitioners focuses solely on *interlocutory* orders that are *not* immediately appealable. But, that disagreement among the circuits is not a question that this case could possibly raise.

Generally, courts of appeal have jurisdiction over appeals from all "final decisions" of the district courts. 28 U.S.C. § 1291 (1988). Petitioners correctly note that interlocutory decisions are not final or immediately appealable orders. Certain interlocutory orders, however, are immediately appealable, including: 1) limited types of interlocutory decisions specified under 28 U.S.C. § 1292(a) (1988), 2) decisions certified for immediate appeal by the district court and accepted by the circuit court under 28 U.S.C. § 1292(b) (1988), 3) decisions subject to immediate mandamus review under 28 U.S.C. § 1651 (1988), and 4) interlocutory decisions that meet the "collateral order" exception of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Congress specifically prescribed geographical limitations on where appeals from federal district courts must be taken in 28 U.S.C. § 1294(1) (1988), which provides: "appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: (1) From a district court of the United States to the court of appeals for the circuit *embracing the district*." 28 U.S.C. § 1294(1) (1988) (emphasis added). *See also TechnoSteel, LLC v. Beers Constr. Co.*, 271 F.3d 151, 154-155 (4th Cir. 2001) (stating § 1294(1) mandates all "reviewable decisions" be reviewed only by circuit court for circuit embracing district court issuing the decision).

The New Jersey District Court's April 24, 2003 order of dismissal was an "immediately appealable order" that could have been appealed to the Third Circuit after it was entered. This Court has held a district court decision is

immediately appealable under § 1291 if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). In *In re Grand Jury Proceedings*, 827 F.2d 868, 871 (2d Cir. 1987), the Second Circuit identified several factors to be considered in deciding whether a court's decision is considered final for purposes of appealability. These factors include "whether the appeal might subsequently be rendered moot, whether there is a possibility of self-correction by the judge whose decision is on appeal, whether hearing the appeal risks interrupting an ongoing proceeding, and whether alternatives to immediate review exist."

Although *In re Grand Jury Proceedings* did not deal with an order of dismissal for lack of personal jurisdiction, the court's analysis is instructive in this case as it distinguishes the cases cited by Petitioners and adopts the holding of the Eleventh Circuit in *Roofing & Sheet Metal Services v. LaQuinta Motor Inns*, 689 F.2d 982 (11th Cir. 1982), which the court below relied upon. The Second Circuit held in *In re Grand Jury Proceedings* that a portion of a district court's modifying order conditioning use of grand jury materials on a showing of particularized need was immediately appealable, noting:

> [t]he ruling . . . *has* ended the litigation in Judge McLaughlin's court . . . [because it] 'leaves nothing' more for Judge McLaughlin to do [in this court because] . . . [t]here is no possibility of self-correction by Judge McLaughlin . . .; A final factor also favors an immediate appeal. Neither the tax court nor the Eleventh Circuit would have jurisdiction to review Judge McLaughlin's ruling . . . "[i]t bears emphasis that, as the language of § 1294(1) establishes, the provision applies to all 'reviewable'

> decisions of the district courts, not only those that are immediately appealable." *Roofing & Sheet Metal Services v. LaQuinta Motor Inns*, 689 F.2d 982, 986 n.5 (11th Cir. 1982). The Eleventh Circuit, therefore, would not have jurisdiction to review Judge McLaughlin's order, emanating from a district court not "embrac[ed]" by that Circuit, as a final decision.

Id. at 871.

Standing alone, a dismissal order for lack of personal jurisdiction is final and appealable. *Wade v. Farmers Ins. Group*, 1996 U.S. App. LEXIS 23393, *10 (7th Cir. 1996); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 944 (7th Cir. 1992). Several circuits have distinguished immediately appealable orders dismissing a case for lack of personal jurisdiction from "combination" orders, where dismissal orders are coupled with an order transferring the case to another court. *See FDIC v. McGlamery*, 74 F.3d 218 (10th Cir. 1996) (finding lack of federal appellate jurisdiction in transferee circuit where court dismissed claims for lack of personal jurisdiction and ordered transfer of claims to federal court in another district); *Chapple v. Levinsky*, 961 F.2d 372 (2d Cir. 1992) (finding no appellate jurisdiction in transferor circuit over district court's interlocutory order dismissing complaint against three defendants for lack of personal jurisdiction and transferring the action against the fourth to another circuit's district court); *Carteret Sav. Bank, FA v. Shushan*, 919 F.2d 225, 229 (3d Cir. 1990) (finding appellate jurisdiction was not sustainable by severing transfer order predicated on lack of personal jurisdiction from the dismissal order, which, "*standing alone*, was final") (emphasis added).

Here, the New Jersey Court's April 24, 2003 order of dismissal was not coupled with a transfer order. And, it dismissed the case against all defendants, leaving nothing

more for that court to decide. Therefore, it was an immediately appealable order which qualifies as a "reviewable decision" under 28 U.S.C. § 1294(1). A majority of federal courts have held that immediately appealable orders, like the April 24, 2003 dismissal order, are not reviewable by a transferee circuit court if the transferor district court that issued the order is outside the transferee circuit.[1]

The Fourth Circuit's decision in *Harding v. Williams Prop. Co.*, 1998 U.S. App. LEXIS 21269, *2 (4th Cir. 1998) is especially instructive since it involved facts similar to those presented here. There, the defendants filed motions to dismiss for lack of personal jurisdiction, and the transferor district court, located in the Fifth Circuit, dismissed the complaint, finding a lack of minimum contacts with Texas.

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[1] *See e.g.*, Eleventh Circuit: *Roofing & Sheet Metal Servs.*, 689 F.2d at 986 (holding the term "reviewable decisions" in § 1294(1) "applies to all reviewable decisions of the district courts, not just to those which are immediately appealable, and emphasizing "Congress has not given us jurisdiction to review decisions of district courts outside this Circuit"); Tenth Circuit: *McGeorge v. Continental Airlines, Inc.*, 871 F.2d 952, 954 (10th Cir. 1989) (holding "the unequivocal language of [§ 1294(1)] leaves no room for doubt that we do not have jurisdiction over "an appeal from the transferor district court's decision"); D.C. Circuit: *Hill v. Henderson*, 195 F.3d 671, 675-677 (D.C. Cir. 1999) (refusing to exercise jurisdiction over its district court's interlocutory dismissal of only one count of plaintiff's claim after case was transferred to district court outside circuit because dismissal not immediately appealable since it dismissed less than all claims; holding "reviewable decisions" under § 1294(1), are limited to those issued by transferor district court that are "subject to review at the time they are entered," and may only be appealed to the circuit court embracing the transferor district court, whereas all other pretransfer, interlocutory decisions "shift" or "flow" to the transferee circuit where they become appealable upon final judgment there); Seventh Circuit: *Jones v. Infocure Corp.*, 310 F.3d 529 (7th Cir. 2002) ([t]he appropriate court of appeals to hear appeals when venue has been transferred from one district to another turns on whether the order entered by the transferor court prior to transfer qualifies for immediate appeal . . . [if it does] any appeal must be taken to court of appeals covering transferor district").

Subsequently, the plaintiff filed a motion to transfer the case under § 1406. The court granted plaintiff's motion and transferred the case to a district court in the Fourth Circuit. *Id.* at *3-4. When plaintiff appealed the transferor court's order of dismissal, the Fourth Circuit held it lacked jurisdiction to review the order: "[w]e have interpreted § 1294(1) to prohibit review of pre-transfer decisions by district courts outside this circuit." *Id.* at *8. The Court supported its decision with analysis equally applicable at bar:

> [plaintiff] could have appealed this final judgment to the Court of Appeals for the Fifth Circuit. Instead, she moved for reconsideration [and] did not ask the district court to rethink its ruling and reinstate the case to that court's docket; rather, she requested that, "in the interest of justice," the court transfer the case under 28 U.S.C. § 1406(a) to a district in which personal jurisdiction was present . . . *the transfer was the desired result of Harding's own motion* . . . [h]er case had been dismissed for lack of personal jurisdiction. She could have fought the ruling or reckoned with the effect of it, and she chose the latter. *Having deliberately forgone the opportunities for reconsideration or review of the personal jurisdiction issue in the Texas district court and in the Court of Appeals for the Fifth Circuit*, she could scarcely have expected the transferee district court to revisit it.

Id. at *8-10.

The decisions Petitioners rely upon are different from this case because the holdings of those cases strictly apply to interlocutory transfer orders which are not immediately appealable. In contrast, the Eleventh Circuit's decision in

Roofing & Sheet Metal Services v. LaQuinta Motor Inns, which the court below relied upon here, is directly applicable to "*all* reviewable decisions of district courts" whether the decision is interlocutory or immediately appealable.

In addition to the fact that the circuit conflict Petitioners advance does not apply to this case because this case involves an immediately appealable order, the cases Petitioners cite to support the proposition are really not in conflict. Petitioners rely on decisions from the Second, Fifth, Sixth and Ninth Circuits, claiming these circuits have adopted the view stated in *Asarte Shipping Co. v. Allied Steel & Export Svc.*, 767 F.2d 86 (5th Cir. 1985) and *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866 (2d Cir. 1950), that "all pre-transfer rulings" of transferor district courts are appealable to the circuit court in the transferee circuit. Further, Petitioners cite to footnote 4 of *American Fidelity Fire Ins. Co. v. United States District Court*, 538 F.2d 1371, 1376-77 (9th Cir. 1976) as stating the rule it asks this Court to adopt.

A more recent decision from the Ninth Circuit, however, demonstrates even the circuit conflict Petitioners (erroneously) assert arises from this case does not warrant certiorari review. In *Posnanski v. Gibney*, 421 F.3d 977, 979 (9th Cir. 2005), the Ninth Circuit held "[i]f a transfer is made from a district court in one circuit to a district court in another circuit, the court of appeals in the latter circuit cannot directly review the action of the first district court in ordering transfer . . . [because] such transfer orders are reviewable only in the circuit of the transferor district court." *Id.* at 980. Directly opposite of Petitioners' representation of that court's position, the Ninth Circuit held: "[w]e join our sister circuits and hold that we may not review a transfer . . . by a district court outside of our circuit to a district court within our circuit. If Posnanski disagreed with the transfer from the Western District of Wisconsin to the District of Arizona, he should have sought review, by whatever means

were available to him, in the Seventh Circuit . . . [h]is remedy lies in the circuit of the transferor court, not the circuit of the transferee court." *Id.*

Specifically, the *Posnanski* Court noted it's "sister circuits," including the First, Fourth, Sixth, Seventh, Eighth, Eleventh and D.C. Circuits, have "all held that a transferee circuit does not have jurisdiction to review a transfer order by a transferor court in another circuit." *Id.* at 979.[2] And

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[2] *See United States v. Copley*, 25 F.3d 660, 662 (8th Cir. 1994) ("We lack jurisdiction to consider . . . [the] North Carolina district court's decision to transfer this case to the Missouri district court . . . [but can consider the] . . . motion to retransfer"); *Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253, 1257 (4th Cir. 1991) ("This court has held that we have no jurisdiction to review a decision to transfer venue rendered by a district court in another circuit"); *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989) ("California district court's order transferring this case to the Southern District of Ohio is not reviewable by this court."); *Reyes v. Supervisor of DEA*, 834 F.2d 1093, 1095 (1st Cir. 1987) ("There is substantial authority to conclude that we are precluded from reviewing an order by a district court in another circuit"); *Roofing & Sheet Metal Servs. Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 986, 989 (11th Cir. 1982) (dismissing appeal of transfer order entered by transferor district court outside Eleventh Circuit for lack of appellate jurisdiction and holding "[c]ongress has not given us jurisdiction to review *decisions* of district courts outside this Circuit"); *Linnell v. Sloan*, 636 F.2d 65, 67 (4th Cir. 1980) ("Under the prevailing view among the circuits, [plaintiffs] should have moved for retransfer of their action in the Eastern District of Virginia, the transferee district court, in order to vest us with jurisdiction to pass on their contention"); *Starnes v. McGuire*, 168 U.S. App. D.C. 4, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc) ("it is well established that a transferee court cannot directly review the transfer order [from an out-of-circuit district court] itself"); *Illinois Tool Works, Inc. v. Sweetheart Plastics, Inc.*, 436 F.2d 1180, 1188 (7th Cir. 1971) ("Defendants argue that transfer of their earlier filed declaratory judgment action from the United States District Court for the Southern District of New York was improper. If it was, defendants should have raised that issue in the Second Circuit, not here."); *Purex Corp. v. St. Louis Nat'l Stockyards Co.*, 374 F.2d 998, 1000 (7th Cir. 1967) ([as to the portion of the complaint] . . . directed against the action of the transferor court which sits in the [8th Circuit], and as . . . plaintiffs [failed to make] in the

the court explained that footnote 4 of its prior decision in *American Fidelity Fire Insurance Co. v. United States District Court*, 538 F.2d 1371 (9th Cir. 1976), which Petitioners rely upon, was uncontrolling dicta:

> we have never addressed whether an out-of-circuit district court's decision to transfer a case to a district court within our circuit is appealable to our circuit, although there is some language suggesting that we can. The confusion stems from our decision in *American Fidelity Fire Insurance Co. v. United States District Court*, 538 F.2d 1371 (9th Cir. 1976). In that case . . . [a]lthough we were dealing with an order from a transferor district court within our circuit, rather than from one outside our circuit, and were holding that mandamus would *not* be granted, we added in a footnote that "on appeal from a final judgment we may exercise our appellate jurisdiction to review a district court's transfer order, *even if the transferor court is not within our circuit*." We cited two cases in support of this proposition. In the first case, *Gulf Research & Dev. Co. v. Harrison*, 185 F.2d 457, 458-59 (9th Cir. 1950) . . . [i]n the second case, *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950), the Second Circuit discussed whether it could review an appeal of a transfer [involving a transferor and transferee court] . . . within

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[Illinois] transferee court . . . any motion to retransfer the case to St. Louis, we have no jurisdiction to act extra-territorially in order to adjudicate the question now raised by plaintiff."); *Preston Corp. v. Raese*, 335 F.2d 827, 828 (4th Cir. 1964) ("[t]he rule is well established that a transfer order is not appealable").

> the reviewing circuit. Thus, neither of the cases relied upon by *American Fidelity* actually dealt with a "transferor court . . . not within our circuit," 538 F.2d at 1377 n.4, nor did *American Fidelity* itself deal with a review of a transfer order from such a court. *Our statement in footnote four was both over-broad and dicta.*

Id. at 979-980 (emphasis added). *See also United States v. French*, 787 F.2d 1381, 1383 n.3 (9th Cir. 1986) (emphasis added) ("[w]e need not address *the dicta* that a civil transfer order is reviewable by the circuit court for the transferee").

In addition to conclusively confirming footnote 4 of *American Fidelity* was mere dicta, the Ninth Circuit's decision in *Posnanski* also shows that *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, another case upon which Petitioners rely, presented the question of whether a circuit court could review a pre-transfer order of a transferee district court within the same circuit, i.e., the case involved an *intra*-circuit transfer rather than an *inter*-circuit transfer, which is not involved in the present case. *Posnanski's* treatment of the decisions in *American Fidelity* and *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.* demonstrates that those decisions do not establish the circuit conflict Petitioners advance. *American Fidelity* and *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.* do not, contrary to Petitioners' submission, stand for the proposition that a transferee circuit court has appellate jurisdiction to review all decisions of transferor district courts located outside the reviewing court's circuit.

Finally, Petitioners' rely on *Asarte Shipping Co.* for its assertion that the underlying concept for appellate authority to review pre-transfer orders is that the transfer of a case ships it out to the transferee district court lock, stock, and barrel. This rule, however, only applies to unique cases

involving a § 1407 case adjudicated by the multidistrict litigation panel and is inapplicable to other transfers, including the transfer that occurred in this case. Under section 1407(b), the judge to whom a multidistrict case is assigned "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." *In re Corrugated Container Anti-Trust Litigation,* 620 F.2d 1086, 1090-1091 (5th Cir.-OLD 1980). In *In re Corrugated Container Anti-Trust Litigation,* a § 1407 case adjudicated by the multidistrict litigation panel, the old Fifth Circuit expressly limited the rule Petitioners rely upon to § 1407 cases (which the present case is not):

> *If [this case] were not a section 1407 multidistrict case*, then there could be no question that a [contempt order] . . . would have to be issued by the District Court for the Southern District of New York . . . an appeal from that contempt order would be proper *only* in the Second Circuit Court of Appeals, 'the court of appeals for the circuit embracing the district' in which the reviewable decision was rendered. 28 U.S.C. § 1294 (1976).

620 F.2d at 1090.

For the reasons stated above, there is no circuit conflict that merits this Court's certiorari review, and the Petition should be denied.

II. The Facts Of This Case Make It A Poor Vehicle For Supreme Court Review Of *Asahi Metal's* Stream of Commerce Theory

Even were the Court to find a certworthy conflict, the facts of this case make it a poor vehicle for review of *Asahi Metal*'s stream of commerce analyses. The Court should not grant a petition where review could have no real effect on the decision below. Because the lower courts in this case, as in *Asahi Metal*, found that personal jurisdiction would be unreasonable, even *assuming the existence of minimum contacts,* due to the international context and foreign residence of this Austrian Respondent, the Court's adoption in this case of a different view of stream of commerce would be inconsequential in the lawsuit.

Although the *Asahi Metal* Court was divided on the stream of commerce theory and level of minimum contacts necessary to support personal jurisdiction, the Court found it unnecessary to choose any one test for minimum contacts because it decided the case based on the second prong of the jurisdictional Due Process analysis, i.e., whether the exercise of jurisdiction over the defendant is reasonable. All Justices agreed that *even assuming minimum contacts*, it was unreasonable to subject the Japanese component manufacturer to suit in California when neither the plaintiff nor the forum state had any significant interest and the exercise of jurisdiction would place a severe burden on the foreign defendant. *Asahi Metal*, 480 U.S. at 114.

The similarity of the facts of this case and those of *Asahi Metal* militate against the Court's review here. In *Asahi Metal*, a California plaintiff injured in a motorcycle accident in California filed a products liability suit in California against Cheng Shin, a Taiwanese manufacturer of tire tubes, who then cross-claimed against Asahi, a Japanese manufacturer of tire valve assemblies located in Japan. *Id.* at 107. Asahi had not solicited any business in California and

had no offices, agents or property there. It sold its tube assemblies to Cheng Shin in Taiwan and had no control over the distribution system that resulted in the incorporation of its components into other products eventually sold in California. *Id.* at 108. The California Supreme Court sustained jurisdiction over Asahi, concluding that Asahi knew some of its valve assemblies would be incorporated into tire tubes sold in California and benefited indirectly from the sale of products incorporating its components in California. *Id.*

Applying the factors articulated by the Court in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980), the *Asahi* Court ultimately found that even assuming the existence of minimum contacts, the exercise of jurisdiction over Asahi would be unreasonable *Id.* at 114. In reaching its decision, the Court weighed "the burden on the defendant, the interests of the forum State . . . the plaintiff's interest in obtaining relief . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 114..

Question 1b of the Petition asks the Court to decide "which view of stream of commerce in *Asahi Metal* is to be applied to the issue of specific personal jurisdiction?" As discussed above, although this very question divided the *Asahi Metal* Court and created the need for separate plurality opinions, it was ultimately superfluous, since the Court based its holding upon the conclusion that asserting jurisdiction over the Japanese defendant would be unreasonable. Petitioners request the Court adopt the views expressed by Justice Brennan and Justice Stevens in their concurring opinions. Pet. at 17. However, the opinions of these Justices lead the Court to the conclusion that should be reached in this case:

> An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional . . . after considering the factors set forth in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980), that California's exercise of jurisdiction over Asahi in this case would be "unreasonable and unfair." *This finding alone requires reversal*; this case fits within the rule that "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." *Burger King*, 471 U.S. at 477-478 (quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 320 (1945)). Accordingly, I see no reason in this case . . . to articulate . . . any . . . test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts.

Id. at 110 (Stevens, J., concurring). *See also Id.* at 107 (Brennan, J., concurring) ("I . . . agree . . . with the Court's conclusion in Part II-B that the exercise of personal jurisdiction over Asahi in this case would not comport with 'fair play and substantial justice.")

Petitioners assert the New Jersey Court applied a "restrictive reading of only the plurality opinion from *Asahi Metal*" and urge this Court to adopt Justice Brennan's and Justice Stevens' views of stream of commerce for determining whether minimum contacts exist with the forum state. Although the New Jersey Court adopted Justice O'Connor's stream of commerce view because Petitioners

argued that defendants engaged in "additional conduct" in New Jersey, the court also expressly considered the views of Justice Brennan and Justice Stevens. The court made it expressly clear that even if it had adopted Justice Brennan's or Justice Stevens' approach it would still have found a lack of personal jurisdiction over defendants because the exercise of jurisdiction would be unreasonable and offend traditional notions of fair play and substantial justice.[3] Thus, there is no practical reason to revisit the *Asahi Metal* stream of commerce theories in this case, or of the determination of the New Jersey District Court that there was no personal jurisdiction over Respondent.

Some circuits have adopted one view of minimum contacts via the stream of commerce over another. *Compare, e.g., Barone v. Rich Brothers Interstate Display Fireworks Company*, 25 F.3d 610, 613-15 (8th Cir. 1994) (adopting a position consistent with that of Justice Brennan) and *Ruston Gas Turbines, Inc. v. Donaldson Company*, 9 F.3d 415 (5th Cir. 1993) (same) with *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992) (adopting a position consistent with that of Justice O'Connor) and *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990) (same).

Most courts of appeals, however, have avoided choosing one position over the other and have instead decided cases based on the facts in the record. See, e.g.,

---

[3] Pet. App. 38a-39a. As set forth in Respondent's Statement of the Case, the court recognized Respondent is a foreign corporation with its principal place of business, employees and documents located in Austria. Further, the court noted the unique burden on the Respondent of defending itself in a foreign legal system would carry significant weight in assessing the reasonableness of the exercise personal jurisdiction . Finally, the court found Petitioners' interests in litigating their claim in New Jersey were minimal because they filed suit for the same relief in Florida.

Beverly Hills Fan Company v. Royal Sovereign Corporation, 21 F.3d 1558, 1566 (Fed. Cir. 1994); *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528, 543 (6th Cir. 1993); *Vermeulen v. Renault*, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir. 1993); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 382 n.3 (9th Cir. 1990), rev'd on other grounds, 499 U.S. 585 (1991).

The Third Circuit has not adopted a single view of the stream of commerce analysis but has decided personal jurisdiction cases based on the facts in the record, considering whether the exercise of jurisdiction over a defendant would be reasonable. *See Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197, 208 (3d Cir. 1998) (exercising jurisdiction over Ohio defendants would accord with notions of "fair play and substantial justice," noting "[t]his is not a case where a severe burden is placed on an alien defendant as in *Asahi [Metal]*"); *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 292 (5th Cir. 1988) ("[t]he situation is unlike that in Asahi[Metal], where the defendant, a Japanese corporation, would have had to travel to California and contend with a foreign legal system. [The defendant in this case] was asked only to travel to a neighboring state.")

In view of the similarity between the facts of this case and those in *Asahi Metal*, the decisions of the Eleventh Circuit and the New Jersey District Court do not warrant this Court's review. As in *Asahi Metal*, the application of the reasonableness factors in this case tip the constitutional balance in favor of New Jersey's and Florida's lack of personal jurisdiction over Respondent. Respondent is an Austrian corporation with its principal place of business, employees and documents located outside of the United States in Austria. It manufactures its engines in Austria and sold the subject engine to Kodiak in Austria. Although Respondent knew Kodiak might distribute the subject engine in South America, Central America or the United States, it

has no knowledge of, or control over, the distribution of the engines after they are sold in Austria. Thus, Respondent was not aware its engine would end up injuring someone in the state of New Jersey. Under the Court's decision in *Asahi Metal*, it would be unreasonable to subject Respondent to suits in New Jersey and Florida.

III. The Eleventh Circuit Properly Applied This Court's Settled Precedent In Finding The Florida District Court Lacked Personal Jurisdiction Over Respondent

Petitioners' assert the Eleventh Circuit Court of Appeals erred because it applied the reasonableness test of Part II-B of *Asahi Metal* to its analysis of general personal jurisdiction. By this characterization of the Due Process reasonableness requirement, Petitioners misunderstand this Court's well-settled precedent.

A review of the Court's decisions addressing general jurisdiction reveals the "reasonableness test" that the Eleventh Circuit applied below did not originate from *Asahi Metal* but has been applied by the Court for decades in general jurisdiction cases. In *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 (U.S. 1984), the Court analyzed whether Texas had general personal jurisdiction over a Colombian defendant. The Court stated the test to be adopted as follows:

> "[d]ue process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has certain minimum contacts with the forum such that the maintenance of the suit *does not offend traditional notions of fair play and substantial justice* . . .; When a controversy is related to or "arises out of" a

> defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction. *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977).

See also Perkins v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952) (finding the foreign corporation, through its president, "[had] been carrying on in Ohio a continuous and systematic, but limited, part of its general business," and the exercise of general jurisdiction over the Philippine corporation by an Ohio court was "reasonable and just"). Thus, it is well-settled that courts must determine whether general personal jurisdiction offends traditional notions of fair play and substantial justice.

In the present case, the Eleventh Circuit appropriately applied the reasonableness analysis in a general jurisdiction case. It followed the reasonableness factors in *Helicopteros* and analyzed the relationship among the Respondent, the forum, and the litigation and held that even assuming Respondent's contacts with Florida were sufficient to warrant jurisdiction, the exercise of general jurisdiction would offend traditional notions of fair play and substantial justice. The Eleventh Circuit held: "[t]he only contact the subject engine had with Florida is that a Florida corporation received shipment of the engine in Florida for delivery to a Mississippi corporation who then delivered the engine to a New Jersey purchaser. The contact of these international Defendants with Florida in terms of *this engine* is even more removed." Pet. App. 8a. Thus, the Eleventh Circuit's decision that general personal jurisdiction in Florida would be unreasonable over Respondent adhered to this Court's well-settled precedent and does not require review by this Court.

Finally, Petitioners' claim this Court should resolve the "conflict" among the circuits regarding which party has the burden of proof to establish the reasonableness of the exercise of jurisdiction over a defendant, once the court finds general personal jurisdiction exists. However, Petitioners cite only two circuit decisions in support this "conflict," and Respondent respectfully submits the Court need not reach this issue because the circuit courts have not sufficiently treated it and since the Eleventh Circuit correctly held general personal jurisdiction over the Respondent in Florida would be unreasonable. "The Court is only interested in conflicts which its decision in a particular case will remove." *See* Frankfurter and Hart, *The Business of the Supreme Court at the October Term*, 1933 Harvard L. Rev. 238, 268 (1934) *Accord* 23 Moore's Federal Practice § 510.21[3][a] (3d ed. 1991).

CONCLUSION

For the foregoing above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THEODORE KOZIOL and LOIS KOZIOL, Plaintiffs, v. BOMBARDIER-ROTAX GmbH, BOMBARDIER INC., KODIAK RESEARCH LTD., and ROTECH RESEARCH CANADA LTD. a/k/a KODIAK RESEARCH CANADA, LTD., Defendants.	CIVIL ACTION NO. 00-1938 (GEB) **MOTION TO MODIFY THE ORDER OF APRIL 24, 2003, DISMISSING THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION**

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PLEASE TAKE NOTICE that on ___, at 10 a.m. or as soon thereafter as counsel may be heard, counsel for plaintiffs will move, pursuant to Fed.R.Civ.P. 59(e) and, alternatively pursuant to Fed.R.Civ.P. 60(b), before the Honorable Garrett E. Brown, Jr., U.S.D.J., of the United States District Court for the District Court of New Jersey, in the Clarkson S. Fisher Federal Building and Court House in Trenton, New Jersey, for an order vacating the order of April 24, 2003, which dismissed the plaintiffs' complaint for lack of personal jurisdiction and for an order transferring this case to the Southern District of Florida.

In support of this motion, counsel for plaintiffs shall rely upon the brief attached hereto.

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May 5, 2003

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IN THE UNITED STATES DISTRICT COURT
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THEODORE KOZIOL and LOIS KOZIOL, Plaintiffs, v. BOMBARDIER-ROTAX GmbH, BOMBARDIER INC., KODIAK RESEARCH LTD., and ROTECH RESEARCH CANADA LTD. a/k/a KODIAK RESEARCH CANADA, LTD., Defendants.	CIVIL ACTION NO. 00-1938 (GEB)

PLAINTIFFS' MEMORANDUM OF LAW IN SPORT OF THEIR MOTION, PURSUANT TO FED. R. CIV. P. 59(e) AND FED. R. CIV. P. 60(b), FOR RELIEF FROM THE DISMISSAL ORDER ENTERED ON APRIL 24, 2003

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I. INTRODUCTION

Plaintiffs Theodore Koziol and Lois Koziol submit this memorandum of law in support of their motion, pursuant to Fed.R.Civ.P. 59(e) and Fed.R.Civ.P. 60(b)(6), to modify the Court's order dismissing their complaint for lack of personal jurisdiction.

This motion is filed solely as a matter of prudence to forestall the possibility of a claim by the defendants in an

identical action filed in Florida that the complaint is barred by a statute of limitations in Florida. The modest relief the plaintiffs seek in this motion does not change the substance of the Court's ruling that personal jurisdiction over the defendants is not proper in New Jersey. Instead, the relief sought is to modify the order from a dismissal of the complaint for lack of personal jurisdiction to an order transferring the New Jersey action to the district court for the Southern District of Florida where the identical complaint is filed.

This relief, if granted, preserves the essence of the Court's ruling on lack of jurisdiction in New Jersey. This relief is permitted by three sections of the United States Code, 28 U.S.C. § 1404(a), 28 U.S.C. 1§ 406(a) and 28 U.S.C. § 1631.

II. THE PROCEDURAL HISTORY

This action arises from the crash of an ultralight aircraft powered by a Rotax 582UL engine on March 20, 1999 in New Jersey. Plaintiffs filed the complaint against defendants Bombardier-Rotax, GmbH ("Rotax"), Kodiak Research, Ltd. ("Kodiak"), and Rotech Research Canada ("Rotech") on April 24, 2000.

Each defendant moved to dismiss the complaint for lack of personal jurisdiction in District of New Jersey. The Court ordered jurisdictional discovery, which ended on December 23, 2002. The plaintiffs filed a saving action against the defendants in Florida on December 30, 2002.

The Court heard oral argument on the motion on March 3, 2003, and reserved its decision. On April 24, 2003, the Clerk of the Court entered the order dismissing

the plaintiffs' complaint for lack of personal jurisdiction over Rotax, Rotech, and Kodiak.

III. THE CONTROLLING LEGAL STANDARDS

Three sections of the United States Code, 28 U.S.C. § 1404(a), 28 U.S.C. § 1406(a) and 28 U.S.C. § 1631, permit a court to transfer an action to another jurisdiction.

Two sections of the Federal Rules of Civil Procedure, Fed.R.Civ.P. 59(e) and Fed.R.Civ.P. 60(b), authorize a Court to reconsider and to modify an order.

In this case, the plaintiffs request that the Court rely on one or more sections of the United States Code permitting the transfer of an action to another jurisdiction and that the Court proceed under Fed.R.Civ.P. 59(e) and Fed.R.Civ.P. 60(b) and modify the April 24, 2003 order dismissing the plaintiffs' complaint for lack of personal jurisdiction.

When the exercise of jurisdiction is found to be improper, 28 U.S.C. § 1631 says:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it

was actually filed in or noticed for the court from which it is transferred.

In order to cure a defect in jurisdiction or venue, 28 U.S.C. § 1406(a) says, "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." When venue is found to be improper, 28 U.S.C. § 1404(a) says, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The authority allowing the plaintiffs to present a motion relying on 28 U.S.C. § 1404(a), 28 U.S.C. § 1406(a) and 28 U.S.C. § 1631 to transfer this action comes from either Fed.R.Civ.P. 59(e) or Fed.R.Civ.P. 60(b).

"The Third Circuit has sometimes ruled on such motions under Federal Rule of Civil Procedure 59(e) and at other times under Rule 60(b). A motion to reconsider may, therefore, be treated as a Rule 59(e) motion for amendment of judgment or a Rule 60(b) motion for relief from judgment or order." *Broadcast Music, Inc. v. La Trattoria E., Inc.*, No. CIV.A. 95-1784, 1995 WL 552881, at *1 (E.D. Pa. Sept. 15, 1995).

When the motion is made pursuant to Fed.R.Civ.P. 59(e), "A motion to alter or amend a judgment may only be granted if: (1) an intervening change in the controlling law has occurred, (2) evidence not previously available has become available, or (3) it is necessary to correct a clear error of law or to prevent manifest injustice." *A.K. Stamping Co., Inc. v. Instrument Specialties Co., Inc.*, 106 F.Supp.2d 627, 667 (D.N.J. 2000). Here, the purpose of the

motion is to prevent the possibility of a manifest injustice by a dismissal of the Florida complaint.

The basis for the motion under Fed.R.Civ.P. 60(b)(6) is the catch-all provision "any other reason justifying relief from the operation of the judgment."

IV. ARGUMENT IN SUPPORT OF MOTION

A. The Florida Law on the Statute of Limitations.

As stated above, the crash of the ultralight aircraft occurred on March 20, 1999 in New Jersey and the complaint was filed in the district court on April 24, 2000, which is within the two-year statute of limitations for personal injury actions under N.J.S.A. 2A:14-2.

Florida has a four-year statute of limitations for personal injury actions, Fla. Stat. Ann. § 95.11(4)(e). The protective action was filed in the Southern District of Florida on December 30, 2002. Consequently, the complaint in the district court for the Southern District of Florida was filed within the four-year statute of limitations since the injury occurred on March 20, 1999.

Florida has a separate statute of limitations for those cases in which the cause of action arose in another state. Florida law will not permit a plaintiff to file a complaint in Florida if the cause of action arose in another state where the cause of action is barred by that state's statute of limitations. Fla. Stat. Ann. § 95.10, says, "When the cause of action arose in another state or territory of the United States, or in a foreign country, and its laws forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state." A district court

judge in Florida explained the rationale for this statute. "The purpose of the borrowing statute [Fla. Stat. Ann. § 95.10] is to prevent forum shopping. . . . So, if the cause of action arose in another state whose statute of limitations would bar the claims, Florida courts will 'borrow' the other state's statute of limitations, barring the action." *Jaisinghani v. Capital Cities/ABC, Inc.*, 973 F. Supp. 1450, 1452 (S.D. Fla. 1997) (internal citations omitted).

The complaint filed in the district court for the Southern District of Florida on December 30, 2002, was filed within the four-year statute of limitations. The complaint will not be barred by Fla. Stat. Ann. § 95.10, because the Court did not dismiss the complaint filed in New Jersey because it was filed after the statute of limitations in New Jersey expired. The Court dismissed the complaint because of lack of personal jurisdiction in New Jersey over the defendants. The Court did not dismiss the complaint because it was filed after the two-year statute of limitations in New Jersey for personal injury actions had run.

That said, prudence dictates the filing of this motion in order to forestall the possibility of a motion to dismiss the complaint in Florida based upon Fla. Stat. Ann. § 95.10.

If the Court exercises its power to transfer the complaint to the Southern District of Florida, the defendants will not be able to claim that the action filed in Florida is untimely.

B. The Authority to Transfer this Complaint to Florida.

The holding of United States Supreme Court in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465-66, 82 S.Ct.

913, 915-16, 8 L.Ed.2d 39 (1962), shows that this Court has the authority under 28 U.S.C. § 1406(a) to transfer the complaint to the district court for the Southern District of Florida.

In *Goldlawr,* a district court in Pennsylvania found that it did not have jurisdiction over a private antitrust action and relied on 28 U.S.C. § 1406(a) to transfer the lawsuit to the Southern District of New York. 369 U.S. at 464. The district court judge in New York found that, since the district court judge in Pennsylvania lacked personal jurisdiction over the defendants, he lacked the statutory authority to transfer the case to New York. *Id.* at 464-65. The Court of Appeals for the Second Circuit affirmed the district court judge's decision. *Id.* at 465. The Supreme Court reversed and permitted the transfer under 28 U.S.C. § 1406(a).

> Nothing in that language [of 28 U.S.C. § 1406(a)] indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendants. . . . Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporation could be "found" or that they "transact" business in the Eastern District of Pennsylvania.
>
> *The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong, the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants*

> *or not.* The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years – that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits.

Id. at 465-67 (emphasis added).

The procedural posture in *Goldlawr* is similar to the procedural posture in this case. The plaintiffs filed the lawsuit in the District of New Jersey under a mistaken belief that the defendants could be found to have transacted business in New Jersey. This Court, having found that filing the lawsuit in New Jersey was mistaken, has the authority to transfer the case to the District of Florida.

On its face, 28 U.S.C. § 1631 also permits the transfer for want of personal jurisdiction, because it says if the "court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed."

There is, however, a split of authority whether 28 U.S.C. § 1631 applies only to lack of subject matter jurisdiction. Some Courts have found it only applies to cases in which subject matter jurisdiction is lacking. *McTyre v. Broward Gen. Medical Center*, 749 F.Supp. 102, 105 (D. N.J. 1990) (although on its face 28 U.S.C. § 1631 makes no distinction between subject matter jurisdiction and personal jurisdiction, the legislative history indicates that the section was only intended to apply in cases where no subject matter jurisdiction exists); *Nose v. Rementer*, 610 F.Supp. 191 (D. Del. 1985) (finding the legislative history

of 28 U.S.C. § 1631 appears to apply only to cases in which the transferor court lacks subject matter jurisdiction).

In the District of New Jersey, Judge Orlofsky found that 28 U.S.C. § 1631 can be used to transfer a case when personal jurisdiction is found lacking. *Chicosky v. Presbyterian Medical Center*, 979 F.Supp. 316, 319 (D. N.J. 1997) (in the interest of justice, an action can be transferred for lack of personal jurisdiction pursuant to 28 U.S.C. §§ 1404(a) and 1631). *See also, Renner v. Lanard Toys, Ltd.*, 33 F. 3d 277, 284 (3rd. Cir. 1994) (suggesting that a district court finding lack of personal jurisdiction may transfer the case pursuant to 28 U.S.C. § 1631).

If the Court wishes to rely on Judge Orlofsky's reasoning in *Chicosky*, the interest of justice test under 28 U.S.C. § 1631 is met. The interest of justice is served by seeing that the plaintiffs have the right to have the chance to prevail on their claims. The ultimate decision whether the plaintiffs can prevail on their claims will be reserved for a later day.

The United States Supreme Court has recognized the unfairness of barring a plaintiff's action solely because a prior action that is filed within the statute of limitations is dismissed in one court and later filed in another court. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 430, 85 S. Ct. 1050, 1055 (1965). In *Burnett*, a FELA action, timely filed in state court, was dismissed because venue was improper and then filed in federal court. 380 U.S. at 425. The district court dismissed the identical complaint because it was filed after the end of the limitations period in FELA. *Id.* The Supreme Court then held:

> Both federal and state jurisdictions have recognized the unfairness of barring a plaintiffs action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run. In both federal and state systems of justice rules have been devised to prevent this from happening.

Id. at 430.

IV. CONCLUSION

In this case, this lawsuit was timely filed in New Jersey. As the Court knows, the defendants vigorously contested the issue of whether jurisdiction was proper in New Jersey. The Court dismissed the complaint for lack of jurisdiction – not for lack of merit.

As a matter of prudence, the plaintiffs must assume that the defendants will contest jurisdiction in Florida. Consequently, the plaintiffs must now take whatever steps are possible to protect against the possibility that the defendants will argue that Fla. Stat. Ann. § 95.10 bars their complaint. The rationale for modifying the order from an order dismissing the complaint for lack of personal jurisdiction to an order transferring the complaint to Florida is to provide the plaintiffs with added protection that they will not face a claim that jurisdiction is improper in the Southern District of Florida because the complaint was not timely filed in Florida.

Transferring this case to Florida will not change the substance of this Court's finding of lack of jurisdiction in New Jersey and will provide the plaintiffs with protection if the defendants challenge the complaint in Florida. Whether the plaintiffs succeed or fail on the merits of their

claim is not at issue here. What is at issue is their right to have the chance to succeed or fail on the merits.

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THEODORE KOZIOL and LOIS KOZIOL, Plaintiffs, v. BOMBARDIER-ROTAX Gmbh MOTORENFABRIK; BOMBARDIER INC., KODIAK RESEARCH LTD., and ROTECH RESEARCH CANADA LTD. a/k/a KODIAK RESEARCH CANADA, LTD. Defendants.	Civ. No. 00-1938 (GEB) **ORDER** (Filed April 24, 2003)

This matter comes before the Court upon the motions to dismiss by defendants, Bombardier-Rotax Gmbh Motorenfabrik; Bombardier Inc., Kodiak Research Ltd., and Rotech Research Canada, Ltd. a/k/a Kodiak Research Canada, Ltd. on plaintiffs' complaint; and the Court having considered the parties' submissions; and having heard oral argument on March 3, 2003; and for the reasons stated in the Memorandum Opinion accompanying this order;

IT IS this 23rd day of April, 2003;

ORDERED that defendants' motions to dismiss are GRANTED; and it is further

ORDERED that the clerk should mark this case CLOSED.

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

(4)

No. 05-633

SUPREME COURT, U.S.
FILED
FEB 24 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

THEODORE KOZIOL and LOIS KOZIOL,

Petitioners,

vs.

BOMBARDIER-ROTAX GmbH MOTORENFABRIK; KODIAK RESEARCH, LTD.; ROTECH RESEARCH CANADA, LTD . a/k/a KODIAK RESEARCH CANADA, LTD.; AERO DISTRIBUTION LIMITED; AERO DISTRIBUTION INTERNATIONAL LIMITED; and PASCAL RONVEAUX,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. a. *Whether a regional circuit court of appeals, in an appeal from a final judgment by a transferee district court, can provide appellate relief involving a pre-transfer ruling by a transferor district court located in another regional circuit?*

(The United States Court of Appeals for the Eleventh Circuit has answered this Question in the negative, as has the United States Court of Appeals for the Tenth Circuit. The United States Courts of Appeals for the Second, Fifth, Sixth, and Ninth Circuits have answered this Question in the affirmative.)

b. *If (a) is answered in the affirmative, which view of "stream of commerce" in Asahi Metal is to be applied to the issue of specific personal jurisdiction?*

(The United States Courts of Appeals for the First, Sixth, and Eleventh Circuits have applied Justice O'Connor's four-justice plurality opinion, while the United States Court of Appeals for the Eighth Circuit has applied both Justice Brennan's four-justice concurring opinion and Justice Stevens' three-justice concurring opinion, and the United States Courts of Appeals for the Third, Fifth, and Ninth Circuits have avoided having to follow any specific one of the three opinions in *Asahi Metal*.)

2. *Whether the reasonableness analysis under Asahi Metal, a specific personal jurisdiction case, applies to a case asserting general personal jurisdiction; and if so, whether the defendant has any burden of proof?*

(The United States Court of Appeals for the Eleventh Circuit has answered the initial Question in the affirmative, and the

QUESTIONS PRESENTED – Continued

second in the negative. The United States Courts of Appeals for the Second, Fourth, Eighth, and Ninth Circuits have answered the initial Question in the affirmative, although the Ninth Circuit answers the second Question in the affirmative, while the Eighth Circuit answers in the negative.)

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REPLY BRIEF OF PETITIONER

Pursuant to SUP.CT.R. 15.6, Petitioners hereby respond to the Brief in Opposition by Kodiak and by Rotax.

A. REVIEW BY REGIONAL CIRCUIT OF PRE-TRANSFER ORDER BY TRANSFEROR DISTRICT COURT LOCATED IN A DIFFERENT REGIONAL CIRCUIT

Kodiak, in its Brief in Opposition, at 7, states:

> Contrary to the assertion of Petitioners, the circuits are unanimous that the appellate review of a transfer order entered by a transferor district court located in a different regional circuit may not be the subject of a direct appeal in the transferee circuit.

This is a new matter for the simple reason that it misses the point. Petitioners seek review of a pre-transfer order, and not review of the transfer order itself. Thus, Argument I, at 7-11 of Kodiak's Brief in Opposition on appellate review of a transfer order, is irrelevant to the issues before the Court.

Kodiak, in its Brief in Opposition, at 11-13, raises a new contention that Petitioners have waived the right to have appellate review of the order determining jurisdiction in the New Jersey District Court because they sought to have the case transferred instead of dismissed. This misses the point that the jurisdictional ruling stayed the same, which is exactly what Petitioners stated in their legal memorandum in support of that motion in the New Jersey District Court. *See* Resp. App. 6a of Rotax Brief in

Opposition. The issue was not waived, but instead was preserved.

Rotax raises a new issue, in its Brief in Opposition, at 15-17, that there is a distinction between review of pre-transfer orders that are non-appealable interlocutory orders and other pre-transfer orders that are immediately appealable. With all due respect, Petitioners submit that their review of the cases cited both by Rotax and by Petitioners do not support this distinction on the issue of appealability of the pre-transfer order following transfer. However, Rotax makes an interesting point, which actually supports the reasons for this Court granting the Petition for Writ of Certiorari, so that the Court may speak clearly on which pre-transfer orders are subject to appellate review in the regional circuit having jurisdiction over the transferee district court.

B. GENERAL JURISDICTION

On Page 18 of Kodiak's Brief in Opposition, Kodiak states that the Eleventh Circuit determined that Dr. and Mrs. Koziol did not establish specific jurisdiction or general jurisdiction, and that having failed to establish the first prong of that test, there was no need for the Eleventh Circuit to consider any further jurisdictional analysis. This is incorrect. Although the Eleventh Circuit doubted there was general jurisdiction under the Florida statute, its *holding* was based on the lack of relationship between the specific aircraft engine and Florida. Pet. App. 7a-8a. However, the Eleventh Circuit focused on the relationship between Kodiak and Rotax on the one hand, and the Florida dealer on the other hand, not on the relationship between Rotax and Kodiak, and not on the extensive

contacts within the State of Florida by both Rotax and Kodiak. *See id.*

Because the focus of general jurisdiction is on the extensive business activity of the defendant corporations in Florida, and not on the individual incident giving rise to the tort action, both Respondents, Kodiak and Rotax, are in error, as is the Eleventh Circuit, when they look to Part II-B of *Asahi Metal*[1] to dismiss this case on the ground that the single engine had no significant contact with Florida.[2] This position is inherently inconsistent with the concept of general jurisdiction described in the *Helicopteros*[3] and *Benguet Consolidated Mining*[4] cases by this Court.

Neither Rotax nor Kodiak contest the extensive facts showing general jurisdiction over each of them in Florida. More particularly, Kodiak does not contest the factual basis for Petitioners' contention of general jurisdiction that (1) senior executives/managers of Kodiak came into Florida to further the business interests of Kodiak in Florida; (2) Kodiak provided logos and display engines to its Florida dealer for use at the Fun 'N Sun airshow in Florida; (3) Kodiak maintained its own booth at the airshow in Florida; (4) Kodiak performed support services for its dealers in Florida; (5) Kodiak provided logos and approval for advertising by the Florida dealer; (6) every one of the

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[1] *Asahi Metal Industry Co., Ltd. v. Superior Court of Calif., Solano Co.*, 480 U.S. 102 (1987).

[2] Respondent Bombardier-Rotax GmbH Motorenfabrik's Brief in Opposition to Petition for Certiorari ["Rotax Brief in Opposition"], at 27.

[3] *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).

[4] *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

ultralight engines that Kodiak sells to its U.S. dealers enters the United States through Florida; (7) Kodiak actively engages in marketing in Florida and required its dealers to show only Rotax products at the Sun 'N Fun airshow in Florida; (8) Kodiak reimburses the Florida dealer, as well as other dealers, for warranty services; (9) Kodiak has itself sold engines (albeit water damaged) in Florida; (10) the CEO of Kodiak has a maildrop for U.S. mail in Florida.[5]

Likewise, Rotax has not disputed the factual basis for the exercise of general jurisdiction over it: (1) Rotax controls and supervises the marketing efforts of Rotax products in Florida, including visits by a Rotax senior executive to the airshow in Florida for purposes of advancing sales of Rotax engines; (2) Rotax handles service and warranty inquiries from Florida passed on by Kodiak; (3) Rotax has tens of thousands of various engines sold in Florida, including engines for SeaDoos, ATVs, and Abrilla motorcycles; (4) All of Rotax's ultralight aircraft engines enter the United States through Florida; (5) Rotax gave Kodiak a territory that includes each State in the United States of America, which thus includes Florida; (6) Rotax has a mandatory requirement for the approval of Rotax logos in advertising by the Florida dealer; (7) Rotax had registered its logo and word mark with the U.S. Patent and Trademark Office; and (8) Rotax had obtained certification of many of its aircraft engines from the U.S. Federal Aviation Administration.[6]

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[5] *See* Petition for Writ of Certiorari, at 5-10 & 24-26.

[6] *See* Petition for Writ of Certiorari, at 4-10 & 24-26.

Finally, both Rotax in its Brief in Opposition at 28, and Kodiak in its Brief in Opposition at 18-20, do not address how the split in the Circuits should be handled, but simply ask the Court to ignore same.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that their Petition is well taken and should be granted with regard to the issues presented for review.

Respectfully submitted,

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